Metroplex Bhd & Ors v Morgan Stanley Emerging Markets Inc & Ors; RHB Sakura Merchant Bankers Bhd & Ors (Interveners)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D1–24-255 OF 2002
VINCENT NG J
30 NOVEMBER 2004

Companies and Corporations — Scheme of arrangement between company and creditors — Restraining order — Application for extension of restraining order — Whether 'good reason' to extend restraining order — Whether reasonable progress towards achievement of a viable and feasible creditors' scheme of arrangement —Whether all conditions in s 176 (10A) had been satisfied

This was the applicants' fifth application for a further extension of the restraining order dated 22 October 2002. The respondents were the creditors of the applicants while the interveners were the applicants' bankers and secured creditors. The applicants, which had first defaulted on various debt payment obligations in 2000, had between 2000 and 2002 sought the assistance of the Corporate Debt Restructuring Committee ('CDRC') to restructure their debts in the aggregate sum of RM1.6 billion but without any success. In 2002, the applicants withdrew from the CDRC restructuring process and initiated proceedings under s 176 (10) of the Companies Act 1965 ('the Act'). The applicants obtained the restraining order on 22 October 2002 and thereafter over a period of two years, the court extended the restraining order on four occasions with the most recent extension being from 15 July 2004 to 22October 2004. On 19 October 2004, approximately four years after the applicants defaulted on its debt payment obligations and more than two years after obtaining the restraining order, the applicants proposed a new scheme of arrangement to its scheme creditors. The issue before the court was whether the applicants' present application to extend the restraining order for a further four months from 22 October 2004 ought to be granted.

Held, dismissing the application with costs:

(1) Section 176 (10A) of the Act not only provides that a restraining order may only be granted if there was a proposal for a scheme of compromise which involved creditors representing at least one-half in value of all the creditors, but it also stipulates that a restraining order may only be extended for a longer period 'if and only if' there is a 'good reason' to do so. The words 'good reason' had been construed by the courts to mean: (i) a *bona fide* scheme of arrangement had been presented with sufficient details provided to enable the creditors to make informed decisions as to its feasiblity and merits; (ii) the scheme of arrangement presented must not be such it was bound to fail; and (iii) the interest of

creditors which were the beneficiaries of the proposed arrangement was safeguarded. The existence of a 'good reason' ought to be predicated upon the applicants' *bona fide* conduct towards achieving a feasible detailed scheme of arrangement for presentation to the general body of creditors (see paras 4 and 5).

(2) The facts showed that: (i) the applicants, after 25 months from the date of the restraining order, were still at the initial meager stages of attempting to achieve a feasible 'scheme of compromise or arrangement between the company and its creditors'; (ii) much less than 50% (being only 21 %) in value of the applicants' scheme creditors had agreed to the proposed scheme; (iii) the draft scheme presented did not contain sufficient particulars for the scheme creditors to consider its viability, for instance, no valuable information on Putra Place (which was a key asset of the applicants) had been provided to the scheme creditors, thus evincing unreasonable delay on the part of the applicants; (iv) the applicants had sought an extension of three months to bring the proposed scheme of arrangement to fruition although it is improbable that approvals from the relevant authorites could be forthcoming in three months; and (v)the applicants had not factored into the schedule for convening a meeting, the requirement for seeking such approvals from the relevant authorities. Thus, the court could only conclude that the applicants did not appear to have a genuine proposed scheme (see paras 7 and 8).

(3) The law on extension of restraining orders required all the provisions of s 176 (10A) of the Act to be met afresh in order to empower the court to grant any extension of the restraining order. A restraining order may only be extended for such longer period for good reasons and 'if and only if' conditions (a) to (d) of s 176 (10A) had been satisfied and that there was reasonable progress towards the achievement of a viable and feasible creditors' scheme of arrangement. Thus, if the restraining order were to be extended after over two years in the same adverse circumstances, it would be tantamount to providing unlimited protection to the applicants. It was therefore clear that the applicants had not met the conditions in s 176 (10A) and would therefore not be in a position to produce a scheme of compromise or arrangement that is viable, reasonable or feasible even if their fifth application to extend the restraining order to 21 February 2005 was granted (see paras 10 and 11).

[**Bahasa Malaysia summary**

Ini merupakan permohonan kelima pihak pemohon untuk melanjutkan lagi perintah penyekatan yang bertarikh 22 Oktober 2002. Responden-responden merupakan pemiutang-pemiutang pihak pemohon dan pencelah-pencelah adalah bank serta pemiutang-pemiutang yang terjamin pihak pemohon. Pihak pemohon, yang telah mengingkari beberapa kewajipan pembayaran balik hutang

mereka dalam tahun 2000, telah dari tahun 2000 sehingga 2002 memohon bantuan 'Corporate Debt Restructuring Committee' ('CDRC') untuk menyusun semula hutang mereka yang berjumlah sebanyak RM1.6 bilion tetapi telah gagal. Dalam tahun 2002, pihak pemohon telah menarik diri daripada proses penyusunan semula CDRC tersebut dan memulai prosiding di bawah s 176 (10) Akta Syarikat 1965 ('Akta tersebut'). Pihak pemohon telah memperolehi perintah penyekatan pada 22 Oktober 2002 dan selepas itu dalam tempoh dua tahun berikutnya, mahkamah telah melanjutkan perintah penyekatan tersebut empat kali dan lanjutan yang terakhir adalah dari 15 Julai 2004 sehingga 22Oktober 2004. Pada 19 Oktober 2004, lebih kurang empat tahun setelah pihak pemohon mengingkari kewajipan membayar balik hutangnya dan lebih daripada dua tahun setelah perintah penyekatan diperolehi, pihak pemohon telah mencadangkan satu skim penyusunan kepada pemiutang-pemiutangnya. Isu di hadapan mahkamah ini adalah sama ada permohonan pihak pemohon untuk melanjutkan lagi perintah penyekatan tersebut untuk empat bulan lagi mulai dari 22 Oktober 2004 patut dibenarkan.

Diputuskan, menolak permohonan dengan kos:

(1) Seksyen 176 (10A) Akta tersebut bukan sahaja memperuntukkan bahawa satu perintah penyekatan hanya boleh dibenarkan sekiranya terdapat skim kompromi yang dicadangkan yang melibatkan pemiutang-pemiutang yang terdiri daripada setengah daripada jumlah nilai semua pemiutang, tetapi ianya juga memperuntukkan bahawa satu perintah penyekatan boleh dilanjutkan 'hanya sekiranya' terdapat 'alasan yang munasabah' untuk melanjutkannya. Istilah 'alasan yang munasabah' telah ditafsirkan oleh mahkamah sebagai: (i) satu skim penyusunan yang bona fide yang dikemukakan dengan butir-butir yang lengkap agar pemiutang-pemiutang dapat membuat keputusan yang berpengetahuan sama ada skim tersebut boleh dikerjakan dan juga tentang meritnya; (ii) skim penyusunan yang dikemukakan tidak boleh merupakan satu skim yang pasti akan gagal; dan (iii) kepentingan pemiutang-pemiutang yang merupakan benefisiari penyusunan yang dicadangkan tersebut semestinya dilindungi. Kewujudan 'alasan yang munasabah' seharusnya berasaskan tingkah laku pihak pemohon yang bona fide untuk mencapai satu skim penyusunan yang boleh dikerjakan yang dikemukakan dengan butir-butir yang lengkap kepada pemiutang-pemiutang secara umumnya (lihat perenggan 4 dan 5).

(2) Ianya didapati bahawa: (i) pihak pemohon, setelah 25 bulan selepas tarikh perintah penyekatan diperolehi, masih lagi berada di tahap permulaan usahanya untuk mencapai satu 'skim kompromi ataupun penyusunan diantara syarikat tersebut dengan pemiutang-pemiutangnya'; (ii) jauh kurang daripada 50 % (hanya merupakan 21 %) daripada jumlah nilai pemiutang-pemiutang skim pihak pemohon yang telah menyetujui akan skim yang dicadangkan tersebut; (iii) skim dalam bentuk deraf yang

dikemukakan tidak mengandungi butir-butir yang lengkap agar pemiutang-pemiutang skim dapat memutuskan sama ada skim itu boleh dikerjakan, contohnya, maklumat yang berguna tentang Putra Place (yang merupakan aset utama pihak pemohon) tidak dikemukakan kepada pemiutang-pemiutang skim, maka menunjukkan bahawa terdapat kelengahan yang tidak munasabah pada pihak pemohon; (iv) pihak pemohon telah memohon lanjutan masa selama tiga bulan untuk menyelesaikan skim penyusunan yang dicadangkan tersebut walaupun ianya mustahil memperolehi kelulusan pihak autoriti yang relevan dalam tempoh tiga bulan tersebut; dan (v) pihak pemohon juga tidak mengambil kira obligasi untuk memperolehi kelulusan tersebut daripada pihak autoriti yang relevan dalam jadual penetapan tarikh mesyuarat. Justeru itu, mahkamah memutuskan bahawa pihak pemohon nampaknya tidak mempunyai skim yang dicadangkan yang sejati (lihat perenggan 7 dan 8).

(3) Undang-undang tentang lanjutan perintah penyekatan mewajibkan bahawa semua peruntukkan di bawah s 176 (10A) Akta tersebut dipenuhi sekali lagi sebelum mahkamah boleh membenarkan sebarang lanjutan masa. Perintah penyekatan hanya boleh dilanjutkan sekiranya terdapat alasan yang munasabah dan 'hanya sekira' syarat-syarat (a) hingga (d) dalam s176(10A) telah dipenuhi dan terdapat perkembangan dalam pencapaian satu skim penyusunan yang boleh dikerjakan. Oleh itu, jikalau perintah penyekatan tersebut dilanjutkan setelah lebih daripada dua tahun dalam keadaan yang masih tidak memuaskan, ianya serupa dengan memberi perlindungan yang tidak terhad kepada pihak pemohon. Oleh itu ianya nyata bahawa pihak pemohon tidak memenuhi syarat-syarat dalam s176(10A) dan oleh itu ianya tidak berada dalam kedudukan untuk mengemukakan satu skim kompromi atau penyusunan yang boleh dikerjakan sungguhpun permohonan kelima untuk melanjutkan perintah penyekatan sehingga ke 21 Februari 2005 dibenarkan (lihat perenggan 10 dan 11).]

Notes

For cases on scheme of arrangement generally, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 645–647.

Cases referred to

Kuala Lumpur Industries Berhad & Ors, Re [1990] 2 MLJ 180 (refd)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1990] 2 MLJ 31 (refd)

Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2) [1993] 2 MLJ 353 (refd)

Legislation referred to

Companies Act 1965 ss 176, (10), (10A), (10A)(c)
Rules of the High Court 1980 O 15 r 6(2)(b)(ii)

Dahlia Lee (SY Lee with her) (Shook Lin & Bok) for the second and third respondent (the applicant in encl 102).
Mohd Ariff Yusof (Cindy Goh with him) (Cheang & Ariff) for the applicants.
RS Nathan (Mohd Izral Khairy with him) (Shearn Delamore & Co) for the first respondent.
Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the interveners (the applicants in encl 111).
Yoong Sin Min (Wong Mae Foon with her) (Shook Lin & Bok) for the fourth respondent (the applicant in encl 109).

Vincent Ng J:

[1] It is consistent with judicial prudence, and indeed with the current mood for transparency, that a judge should endeavour to promptly render at least the crux (however skimpy) of the rationale for his decision even should he be so severely pressed for time, especially where the subject matter involves an immense sum — the gross debt in the instant case is RM1.6 billion; such prudence, so as to obviate any speculation in financial circles that the judge may have made a peculiar or controversial decision at odds with a reasoning mind. Before me is the applicants' (the Metroplex Group) fifth application vide summons in chambers (encl 82) for a further extension of the Restraining Order ('RO') dated 22 October 2002. Following encl 82 various creditors of the applicants filed applications under O 15 r 6(2)(b)(ii) of the Rules of the High Court 1980, vide encls 102, 109 and 111 (and under encls 77 and 81 earlier) to intervene in encl 82 and to oppose the extension of the RO. Byconsent of the applicants in encl 82, the third and fourth respondents, vide encls 102 and 109, were granted leave to intervene in and to participate in the arguments in encl 82. Enclosure 82 was also opposed by the first and second respondents, who were earlier allowed by consent to intervene under encls 77 and 81 respectively. Also allowed, by consent, to intervene were 10 out of the 11 interveners vide encl 111 (as the fourth intervener withdrew upon commencement of the hearing). The applicants in encl 111 are the applicants' bankers and secured creditors, who also prayed (in prayer four of encl 111) for the setting aside of the original RO dated 22 October 2002 and its subsequent renewals. Ranged against the applicants at the hearing (which was adjourned into open court) was a team of about 11 lawyers who represented the respondents and interveners in encls 77, 81, 102, 109 and 111.

[2] The undisputed facts in the matter are, *inter alia*:

(a) the applicants first defaulted on various debt payment obligations in 2000;

(b) between 2000 and 2002, the applicants sought the assistance of the Corporate Debt Restructuring Committee ('CDRC') to restructure their debts in the aggregate sum of RM1.6 billion — but without any success;

(c) in 2002, the applicants withdrew from the CDRC process and initiated proceedings under s 176(10) of the Companies Act 1965 ('the Act');

(d) the applicants obtained the RO on 22 October 2002 — thereafter the court extended the RO on four occasions during a period of over two years. The most recent extension was from 15 July 2004 to 22 October 2004; and

(e) on 19 October 2004, approximately four years after default and over two years after the RO, the applicants proposed a new scheme of arrangement ('the Proposed Scheme') to its creditors ('the Scheme Creditors').

[3] As a decision on the matter now before me would have to be made in accordance with the law, it is appropriate to set out the following relevant statutory provisions applicable to encl 82 to extend the RO. Section 176 (10A) states that:

> The court may grant a restraining order under sub-s (10) to a company *for a period of not more than ninety days or such longer period* as the court may for good reason allow if and only if:
>
> (a) it is satisfied that *there is a proposal for a scheme of compromise* or arrangement *between the company and its creditors* or any class of creditors *representing at least one-half in value of all the creditors*;
>
> (b) the restraining order is *necessary to enable* the company and its creditors *to formalise the scheme of compromise* or arrangement for the approval of the creditors or members pursuant to sub-s (1);
>
> (c) *a statement in the prescribed form* as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; *and*
>
> (d) it approves the person nominated by a majority of the creditors in the application by the company under sub-s (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director (Emphasis added.)

[4] Clearly, s 176(10A) not only provides that an RO may only be granted if there is a proposal for a scheme of compromise which involves creditors representing at least one-half in value of all the creditors, but it also stipulates that an RO may only be extended for a longer period '*if and only if*' there is a 'good reason' to do so. The words 'good reason' have been construed by the courts to mean that:

(a) a *bona fide* scheme of arrangement has been presented, with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits (see *Re Kuala Lumpur Industries Berhad & Ors* [1990] 2 MLJ 180);

(b) the scheme of arrangement presented must not be such that it is bound to fail (see *Twenty First Century Oils Sdn Bhd v Bank of Commerce (M) Bhd & Ors (No 2)* [1993] 2 MLJ 353); and

(c) the interest of creditors, that is, the beneficiaries under the proposed arrangement is safeguarded (see *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1990] 2 MLJ 31).

[5] Obviously, premised on the above requirements, the applicants' submission that this is the last extension of RO requested and that it is only for a period of four months from 22 October 2004 (or only about three months from 30 November 2004 to 21 February 2005) could not per se constitute 'good reason'. Surely, the existence of 'good reason' ought to be predicated upon the applicants' *bona fide* conduct towards achieving a feasible detailed scheme of arrangement for presentation to the general body of creditors. Itis not feasible if, for example, the scheme to be presented is bound to fail.

[6] The highest water mark of the applicants' case that 'good reason' has been shown could be gleaned from their counsel's first submission and submission in reply. In para 4 of the first submission, counsel listed out the following 'major progress in relation to the proposed scheme':

4.1 The preparation of the draft explanatory statement;

4.2 The incorporation of comments by the scheme creditors;

4.3 The appointment of Independent Financial Advisor and Independent Legal Counsel for the scheme creditors;

4.4 The decision to sell Putra Place which will be a major source of repayment to the scheme creditors;

4.5 A reputable valuer, M/s Jones Lang Wootton, has also been appointed by the applicants to value the properties owned by the applicants; and

4.6 Many meetings held with scheme creditors on the proposed scheme.

[7] The above desultory statements must be read in conjunction with the damning piece of evidence disclosed in para 6 of the submission in reply where counsel also stated that: 'To date 48.52% of the total scheme creditors have reverted in writing stating that they are agreeable to the present application (for extension) and some to the proposed scheme itself'. Now, on point of clarification, En Ariff explained to this court that the word 'some' above meant that only 21% in value of the total Scheme Creditors have agreed to the Proposed Scheme itself. In my considered view, the above underscored

words in paras 4.1 to 4.6 reveal that the applicants are, after 25 months from the granting of the RO, only now still at the initial meager stages of attempting to achieve a feasible 'scheme of compromise or arrangement between the company and its creditor'. Militating against the aforesaid statutory requirements, parag 6 of counsel's submission acknowledges that much less than 50% in value (being 21% in value) of total Scheme Creditors have agreed to the Proposed Scheme.

[8] The applicants said that they have held 'many meetings' but yet after over two years they have not achieved any reasonable or viable result in terms of progress towards finalising the scheme of arrangement. It is beyond question that any draft scheme presented must contain sufficient particulars for the Scheme Creditors to consider its viability. For instance, I note that a key asset of Metroplex, the sale of which is pivotal to the Proposed Scheme, is the proposed disposal of the property known as Putra Place. Yet, no valuable information on Putra Place has been provided to the Scheme Creditors. Inthis regard, it is observed that only on 25 October 2004, after the fifth application for extension of the RO was filed, was M/s Jones Lang Wootton consulted to provide a valuation of the assets of the Metroplex Group. The Metroplex Group had at least two years (with four extensions of the RO) to provide that valuation but had failed to do so, thus evincing unreasonable delay on the part of the applicants. The applicants are now seeking a period of less than three months to bring this Proposed Scheme to fruition. As the offer of settlement to all the creditors under the Proposed Scheme, apart from the proceeds of sale of Putra Place, consists of issuance of bonds and loan stocks, approvals from the relevant authorities (the Securities Commission and Bank Negara Malaysia) would be required. I find it improbable that such approvals will be forthcoming within three months if granted. Furthermore, I observe that in exh 'MB–14' of the applicants' supporting affidavit, the applicants have not even factored into the schedule for convening a meeting, the requirement for seeking approvals. Surely, it would not be feasible to seek approvals only after creditors have agreed at the meeting, as a rejection of the Proposed Scheme by the authorities post approval would render the whole exercise futile. Therefore, based on the above considerations, this court could only conclude that the applicants do not appear to have a genuine proposed scheme.

[9] Thus, for more than two years since obtaining the RO, on 22 October 2002, the applicants have no scheme which can be voted on by the creditors. There is no statutory creditors' meeting ready to be convened as required under s 176 of the Act, nor has an order been applied for to convene such meeting. It is only when 'such compromise or arrangement has been proposed between the company and its creditors' will the court grant an order to restrain further proceedings against the company. Clearly, until now there is no such compromise or arrangement proposed and the requirements stipulated in sub-s (10A) have not been met at all.

[10] On the law on extensions of an RO, I would hold that all the provisions of s 176(10A) must be met afresh (which the applicants have not done) in order to empower the court to grant any extension of the RO after the first RO. My reasons are twofold. The peculiar and unusually strong wording in s 176(10A) which stipulates that the 90-day period may be extended for 'such longer period … for good reason if and only if' conditions (a) to (d) have been satisfied. In my view, the legislative scheme of specifically stipulating, in imperative or peremtorarily conditional language, as encompassed in the words 'if and only if' in the new sub-s (10A) of s 176 surely mandates, inter alia, the continued prevalence of condition (10A)(a) — that is, the consensual representation in the scheme of at least one-half in value of all the company's creditors — as well as a re-compliance with condition (10A)(c) of the subsection, before the court could exercise its discretion to extend the RO. Furthermore, for such extension, the court has to be satisfied that the other conditions in sub-s (10A) are also met and that there is reasonable progress towards the achievement of a viable and feasible creditors' scheme of arrangement. Thus, if this court is to extend the same after over two years, in the teeth of such adverse circumstances in the instant case, it would be tantamount to providing unlimited protection to the applicants, especially as they have not even rendered satisfactory statements in the prescribed form as required under s 176(10A)(c) in order for the creditors to determine how their affairs and assets have been dealt with whilst the RO prevailed. Though the applicants had said that the proceeds of sale of Tawakal and Infra Sari had been factored into the Annual Report of the first applicant yet they have conceded that such proceeds were not factored into the Proposed Scheme. They also asserted that 'indicative valuation of the properties is estimated to be completed by the end of November by M/s Jones Lang Wootton', yet, we have come to the end of November 2004 and no such valuation seem to be in sight. The fresh scheme in this current application was only proposed on 15 October 2004 towards the end of the fourth extension of the RO, and without any explanation as to the withdrawal of the 'public listed company' from the Proposed Scheme.

[11] Even until now the applicants could only state that only 48.52% of the creditors have agreed to the application for extension of the RO and only 'some' creditors to the Proposed Scheme itself whereas s 176(10A) requires approval of at least 50% in value of creditors before the court could grant a RO. In my view, this shows the unfeasibility of the draft Proposed Scheme and it is bound to fail, a fortiori, considering that En Ariff has now clarified that 'some' creditors meant only 21% in value of creditors. For all the above reasons I find that the applicants have not met the conditions in sub-s (10A) and I am convinced that the applicants would not be in the position to produce a scheme of compromise or arrangement that is viable, reasonable or feasible even if their fifth application to extend the life of the RO to 21 February 2005 is granted.

[12] In the event, I am constrained to, which I now do dismiss the applicants' application for extension of the RO under encl 82 with costs. However, the applicants shall have liberty to apply for a fresh RO should they at any time hereafter be in the position to present a bona fide viable or feasible scheme of compromise, provided that such fresh application is served on the present respondents and interveners.

[13] In view of the above factual matrix that are adverse to the applicants, and the various unsettling features of this case my hands are tied, though I am sympathetic to their plight in not being able to make even modest progress towards securing one (or several joint) white knights, or in achieving a feasible scheme of arrangement, despite a lapse of 25 months after having secured an order to restrain so many restless creditors to the tune of an aggregate debt value of over RM1.6 billion. Thus, at any time hereafter, should the applicants be, in the position to demonstrate that they are in a position to present a viable scheme of arrangement for ready approval by a majority of scheme creditors within a reasonable and ascertainable time, I am ready and willing to hear their fresh application, upon a Certificate of Urgency, even during the court vacation this December. I make no order on prayer four of encl 111 as it may affect third party rights on transactions if any, when the RO prevailed without any objections from any quarter.

Application dismissed with costs.

Reported by Lai Fui Sim